No. 2607

United States

Circuit Court of Appeals

For the Ninth Circuit.

J. B. BISTLINE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

TERRELL & TERRELL,
Attorneys for Plaintiff in Error.
Residence, Pocatello, Idaho.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

In the United States Circuit Court of Appeals for the Ninth Circuit.

J. B. BISTLINE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

On the 30th day of June, 1906, the defendant in error, United States of America, executed, delivered and issued to the plaintiff in error, Joseph B. Bistline, a patent to certain public lands of the said United States, under the Public Land Laws relating to homesteads (Trans., pp. 10, 20, 40).

About four years after receiving this patent, to wit, September 20th, November 1st and November 4th, 1910, plaintiff in error conveyed all of the lands covered by said patent to divers persons, for valuable considerations, and the grantees named in such conveyances went into immediate possession of their respective tracts, which conveyances were, on or about their respective dates, duly recorded in the office of the County Recorder of Bannock County, State of Idaho, in accordance with the laws of the State of Idaho, and conveyed all of the land described in said patent (Trans., p. 34).

On the 19th day of April, 1911, after the lands described in said patent had been conveyed as aforesaid and such conveyances recorded, the defendant in

error, United States of America, commenced a suit in equity for the cancellation of said patent, alleging as a cause of action the identical state of facts which is alleged as the cause of action at bar (Trans., pp. 35–51).

Plaintiff in error answered in said suit, denying all material allegations of the bill (Trans., pp. 43–51).

Replication was filed and served September 17th, 1913 (page 52).

Upon the issue thus joined in said suit in equity, a decree was duly made and entered on the 17th day of September, 1913, adjudging and decreeing that the said suit be dismissed absolutely, unconditionally and without reservation, and that plaintiff take nothing by said action (Trans., p. 53).

Thereafter, on the 17th day of September, 1913, the defendant in error commenced this *action at law* for damages based upon the identical state of facts alleged in the suit in equity to cancel said patent aforesaid, covering the identical lands described in said former suit in equity to cancel said patent (Trans., pp. 5–12).

To the complaint in said action at law, the defendant (plaintiff in error), on the 3d day of October, 1913, filed his demurrer, one of the grounds of said demurrer being that said complaint fails to state facts sufficient to constitute a cause of action (Trans., pp. 12, 13).

This demurrer was, on the 31st day of January, 1915, overruled by the Trial Court (Trans., pp. 13, 14).

Thereafter, on the 21st day of February, 1914, the plaintiff in error answered unto said complaint denying the charges of fraud (Trans., pp. 14–22).

Thereafter, by leave of Court first had and obtained, on the 9th day of March, 1914, plaintiff in error filed his amendment to his said answer, setting forth two affirmative defenses by way of pleas in bar, to wit:

1. That the facts alleged in said complaint in said action at law, to recover damages, have been once adjudicated and finally determined on the merits; and,

2. That the defendant in error had, by commencing and maintaining his said suit in equity to cancel said patent, made an election between two inconsistent remedies, then open to the defendant in error's choice and was bound by such election (Trans., pp. 24–28).

Defendant in error, on the 10th day of March, 1914, moved to strike the said amendment to answer, setting forth said affirmative defenses from the files of said action, on the grounds that said affirmative matters alleged are irrelevant and immaterial (Trans., p. 29).

The said motion was denied (Trans., p. 30).

Upon the issues joined by the complaint and answer as amended, the cause proceeded to trial on the 16th day of March, 1915, and a verdict returned in favor of the defendant in error, for the sum of six hundred and no/100 ($600.00) dollars, upon which verdict judgment was thereafter, on the 24th day of March, 1915, entered (Trans., pp. 30–32).

At the commencement of said trial and before any testimony was given, the plaintiff in error objected to the first testimony offered, and to any testimony in the trial of said cause, on the ground that said complaint failed to state facts sufficient to constitute a cause of action or any part of a cause of action, or to entitle the defendant to any relief whatever, which objection was by the Court overruled, to which ruling the plaintiff in error then and there excepted, which exception is incorporated in the Bill of Exceptions herein (Trans., pp. 33, 34).

Defendant in error was then permitted to offer testimony in proof of the allegations of said complaint, and among other testimony offered by and received on behalf of defendant in error were three certain deeds made, executed and delivered by the plaintiff in error, Joseph B. Bistline, and his wife, Grace Bistline, to the persons and of the dates and acreage as follows:

To Joseph H. Tolman, Jr., November 4th, 1910, eighty (80) acres;

To Henry Caribo and Samuel Block, September 20th, 1910, forty (40) acres;

To Henry S. Woodland, November 1st, 1910, forty (40) acres.

That all of said deeds of conveyance were duly executed and delivered, for valuable consideration; and the grantees therein named went into immediate possession of said respective tracts thereunder, which conveyances covered and conveyed all of the lands described in said patent, and each of said deeds were on or about their respective dates duly recorded in the

office of the County Recorder of Bannock County, State of Idaho, in accordance with the laws of said State (Trans., pp. 33–35).

Thereupon the defendant in error rested its case and the plaintiff in error offered in evidence the said Bill in Equity, to cancel said patent hereinbefore referred to, with the answer thereto, and the replication to said answer, and the decree of said court upon the issues thus joined, in support of his special pleas in bar of *res adjudicata,* and the election of remedies, the said bill, answer, replication and decree being incorporated in said Bill of Exceptions (Trans., pp. 35–53).

Plaintiff in error relied upon his said special pleas in bar and with this evidence rested (Trans., p. 54).

Whereupon the plaintiff in error requested the Trial Court to pass upon and decide as to the sufficiency of said proof in support of his special plea, of the previous election of remedies, as a matter of law, and to instruct the jury to find for the plaintiff in error upon said plea; but the Court refused to pass upon the sufficiency of the evidence in support of said plea and refused to give the jury a peremptory instruction to find for the plaintiff in error upon said plea, and held that the Court would submit the evidence under said plea to the jury under proper instructions; to which ruling of the Court the plaintiff in error then and there excepted, which exception is incorporated in his Bill of Exceptions herein (Trans., p. 54).

Thereupon the plaintiff in error requested the Court to pass upon and decide as to the sufficiency

of the proof in support of his special plea of *res adjudicata,* as a matter of law, and to instruct the jury to find in favor of the plaintiff in error upon said plea, but the Court then and there held and decided that the proof and evidence offered was not sufficient in law to support said plea, and refused to give the jury peremptory instruction to find for the defendant upon said plea and denied said plea; to which ruling of the Court the plaintiff in error then and there excepted, which exception is incorporated in his Bill of Exceptions herein (Trans., pp. 54, 55).

The Court then instructed the jury upon the law relating to the election of remedies as applicable to the facts of the case, which was the only instruction and all of the instructions upon said question; to which instruction the plaintiff in error then and there objected and excepted, which exception is incorporated in his Bill of Exceptions herein (Trans., pp. 55–57).

The defendant in error then and there requested the Court to give his instruction, set forth on page 57 of the Transcript, which requested instruction the Court refused, to which ruling the plaintiff in error then and there excepted, which exception is incorporated in the said Bill of Exceptions.

From the foregoing statement of facts, the plaintiff in error makes the following assignment of errors:

SPECIFICATIONS OF ERRORS.

First.

The Court erred in overruling the plaintiff in error's demurrer to the defendant in error's complaint

and in deciding that said complaint stated facts sufficient to constitute a cause of action against the plaintiff in error.

Second.

The Court erred in permitting the defendant in error to make any proof under said complaint, for the reason that said complaint failed to state facts sufficient to constitute a cause of action or to entitle the defendant in error to any relief whatever.

Third.

The Court erred in submitting to the jury the evidence of the plaintiff in error's special plea in bar, growing out of the defendant in error's election of remedies.

Fourth.

The Court erred in refusing to give to the jury a peremptory instruction to find for the plaintiff in error upon his said special plea in bar, growing out of the election remedies by the defendant in error.

Fifth.

The Court erred in its instruction to the jury upon the question of the election of remedies in failing to instruct the jury that *means of knowledge* of all of the facts and rights in the matters to be litigated would bind the defendant in error as fully as actual knowledge of such facts, and in giving to the jury the following instruction, to wit:

"If, however, you should find in favor of the Government upon this issue, that is, if you should find that the defendant falsely represented that he had resided upon the land, when as a matter of fact he had not, then it will be necessary for you to consider

another defense, called the affirmative defense, set up for the defendant, and briefly, I may say to you a little more fully what I have already referred to, and that is that on April 10, 1911, the Government commenced an action in this court setting forth substantially the same facts as are now set forth in the complaint in this case, except that in the first case the Government sought a different sort of relief, that is, it asked that the patent be set aside; it did not ask for damages. It was what is called an equity suit. Later on, on May 2, 1911, the record shows that an answer was filed by the defendant, in which he denied the charges of fraud and further set forth that prior to the commencement of that suit he had transferred this land to divers persons, and the records of the county offered in evidence show that some at least, if not all, of the conveyances were of record—were of public record. On September 17, 1913, as further shown by this record, upon motion of the then United States District Attorney, the suit was dismissed; decree was entered dismissing it, and providing that the plaintiff take nothing by reason of the suit. Now, as I have already explained to you, the Government had the right either to pursue that remedy or to pursue this. The contention of the defendant is that, having pursued that remedy, it is now barred from pursuing this, that having elected one of two remedies, it is bound by the result of that suit. There is a general principle of law that where one has two remedies, or two inconsistent remedies, if the person, being advised of his rights, and being aware of the facts, adopts one of those remedies, he cannot

later pursue the other; he is limited to the one. So that I advise you in this case, and in the light of that general principle, that if you find that at the time the Government commenced that suit in equity, which was commenced on April 10, 1911, and at the time that it prosecuted it, it was aware of its rights, that the Government officers were aware of the rights of the Government, its legal rights, and was also aware of the facts as now disclosed, including the fact of the transfer of these lands by the defendant to third persons, then you may properly conclude that it is bound by the election of the remedy which it made in that suit, and it could not recover in this one."

Sixth.

The Court erred in refusing to give the requested instruction to the jury of the plaintiff in error upon said question of the election of remedies, to the effect that the *means of knowledge* of all of the facts and rights to be litigated would bind the defendant in error, if with such *means of knowledge* the defendant in error should make an election of remedies then open to it, and particularly in refusing to give the following instruction, to wit:

"If the plaintiff, on the 10th day of April, 1911, when the action in equity to cancel the patent in question was commenced, had full knowledge, or the *means of knowledge* of the facts and of its rights in the matter then to be litigated, including the knowledge or the *means of knowledge* of the previous conveyance of all of said lands described in said patent by the defendant, and then elected to commence the said action in equity to cancel said patent, it would

be bound by such election and could not recover in this action for damages, growing out of the same state of facts."

Seventh.

The evidence is not sufficient to support the verdict and judgment herein in this, that upon said question of election of remedies the evidence is documentary and without conflict, showing that the defendant in error had the *means of knowledge* of all of the facts and of its rights and of the conveyance of all of said lands by the plaintiff in error, at the time it made its election of remedies.

Eighth.

The Court erred in holding and deciding that the plaintiff in error had failed to establish his plea in bar of *res adjudicata* and in failing and refusing to give the jury a peremptory instruction to find in favor of the plaintiff in error upon said plea, the evidence of such plea, being documentary and without conflict, showing conclusively that the issues involved in the action at bar had previously, at the commencement of this action, been determined by judgment duly made and given.

Ninth.

The Court erred in entering judgment upon said verdict in favor of the defendant in error and against the plaintiff in error, whereas judgment should have been rendered in favor of the plaintiff in error and against the defendant in error, dismissing the complaint.

ARGUMENT.

The questions of law raised by the foregoing speci-

fications of error may be conveniently discussed and presented under three general heads, viz.: The sufficiency of the complaint. Was there an election of remedies? And had the matters at bar been previously adjudicated? We will present these questions in the order named.

SUFFICIENCY OF COMPLAINT.

Assignments of error 1 and 2 raise the one question, viz.: Do the facts alleged in the complaint constitute a cause of action?

It is alleged in paragraph 6 of said complaint (Trans., p. 10), that the defendant in error, through its proper officers, "issued and delivered to the said Joseph B. Bistline the complainant's patent *dated June 30th, 1906,* conveying to the said Joseph B. Bistline *the legal title* to said land."

This action was commenced more than *seven years later,* to wit, on *17th day of September, 1913.*

It is therefore our contention that at the end of six years from the date of the issuance of the patent, the equitable title to the lands conveyed by said patent became invested in the patentee, so that as against the defendant in error he held both the legal and equitable title. In other words, that at the end of the six-year period, the title of the plaintiff in error became absolute, unconditional and indefeasible as to the defendant in error, and cannot be assailed directly or indirectly for the fraud of the patentee or the fraud of the public land officers.

We are not pleading nor relying upon the statutes of limitations as a direct and specific defense to this action, but from the authorities hereinafter pre-

sented we believe that it is a material element entering into the question as to whether or not the complaint states a cause of action, and for that reason we call attention to section 8 of an act of Congress approved March 3, 1891, chapter 561, 26 Stats. L. 1093, Fed. Stat. Annotated, vol. 6, page 526, in this language:

> "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and *suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.*"

Therefore, at the time of the commencement of the suit at bar, an action to cancel or annul the patent described in the complaint could not have been maintained, for the reason that more than *seven years* had elapsed since the date of the issuance of the patent in question.

When the United States issued the patent to the lands in question, it parted with the legal title only. It is so alleged in the complaint. When the six-year period had elapsed after the date of the issuance of the patent, then the patentee was not only invested with the legal title but also the *equitable title* to the lands covered by the patent as against the United States.

It is true that ordinarily statutes of limitation only affect the remedy, but in actions where the title to land is involved, such statutes not only bar the remedy but extinguish the right and vest a perfect title

in the adverse holder.

The Federal Courts have considered this question many times, and we here present some of the leading authorities, quoting from the decisions the matter in point.

> "Statutes of limitation give a *vested right* in real property which cannot be taken away without due process of law. These statutes operate to *transfer the title from one person to another.*"
>
> N. P. R. R. Co. vs. Ely, 197 U. S. 1.
> Toltec Ranch Co. vs. Cook, 191 U. S. 532.

> "The lapse of time limited by the statutes, specifying the time in which suits must be commenced for the recovery of lands sold for taxes, not only bars the remedy, but *extinguishes the right and vests a perfect title in the adverse holder*"
>
> Leffingwell vs. Warren, 2 Black (U. S.), 599.
> Davis vs. Mills, 194 U. S. 457.
> Campbell vs. Holt, 115 U. S. 623.
> Arrington vs. Liscomb, 34 Cal. 365–383.

In construing the identical statute hereinbefore quoted (sec. 8, Statutes at Large, 1093), the Supreme Court of the United States in the case of the United States vs. Chandler-Dunbar Co., 209 U. S., page 447, says:

> "In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land at least, which cannot escape from the jurisdiction, generally are held to *affect the*

right, even if in terms only directed against the remedy."

Citing, Leffingwell vs. Warren, 2 Black (U. S.), 599–605.
Sharon vs. Tucker, 144 U. S. 533.
Davis vs. Mills, 194 U. S. 451–457.

And the Court in further discussing this question, says:

"This statute (sec. 8, 26 Stat. L. 1093) must be taken to mean that the patent is to be held good, and *is to have the same effect against the United States that it would have had if it had been valid in the first place.*"

In other words, after the lapse of six years, the patent charged with fraud by the complaint in the action at bar is just as good and just as valid as if it were based upon the best final proof ever submitted to the Land Department of the United States—just as good as if there was not the slightest suspicion of fraud attached to it.

If this conclusion is correct, then the allegations of fraud contained in the complaint are wholly immaterial and redundant, and should not be considered, without which there is not the semblance of a cause of action stated.

We are not content to rest the discussion upon the cases cited. We think the case of United States vs. Winona R. R. Co., 165 U. S. 463, is strictly in point upon the question under consideration. In passing upon the statute above mentioned, and in discussing the nature and character of the title ac-

quired by a patentee after the lapse of the statutory period, the Court says:

> "In other words, it [United States] has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitation; that when its proper officers acting in the ordinary course of their duty, have conveyed away land which belonged to the Government, such conveyance should, *after the lapse of the prescribed time, be conclusive against the Government,* and this notwithstanding any errors, irregularities or improper action of its officers therein. Thus in the act of 1891 (26 Stat. 1093), it is provided that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter issued, suits should only be brought within six years after the date of issue. *Under the benign influence of this statute it would matter not what* the mistake or error of the land department was, *what the fraud or misrepresentation of the patentee were, the patent would become conclusive as a transfer of the title,* providing only that the land was public land of the United States and open for sale and conveyance through the land department."

Taking the allegation of the complaint to be true that the patent therein mentioned and charged to have been fraudulently obtained was issued *June 30th, 1906,* and it further appearing that the action at bar was not commenced until the *17th day of*

September, 1913, what is the effect of those facts upon the alleged cause of action in the case at bar?

The Supreme Court of the United States in the case of United States vs. Chandler-Dunbar Co., *supra,* says that such facts have *"the same effect against the United States that it would have had if the patent had been valid in the first place."*

The Supreme Court of the United States in the case of United States vs. Winona R. R. Co., *supra,* says the title of plaintiff in error to the land in question under the patent alleged in the complaint *is conclusive against the Government, and it would matter not what the fraud or misrepresentations of the patentee were.* What does the Court mean when it says that, *"It would matter not what the fraud or misrepresentations of the patentee were?"* Do they not mean that after the statute has run this question of fraud is wholly immaterial in any action assailing the regularity of the issue of the patent?

The same Court in the same case also says that *such a conveyance, after the lapse of the prescribed time, is conclusive against the Government;* but if the defendant in error is permitted to maintain this action, *is the Government concluded?*

The complaint alleges fraud on the part of the plaintiff in error in procuring the patent, but if *"it matters not what the fraud or misrepresentations of the patentee were,"* are the allegations of fraud in the complaint material? If the allegations of fraud are eliminated, there is no cause of action stated.

From the authorities cited it would appear that the title of the plaintiff in error to the lands described in said patent were, at the time of the com-

mencement of this action, absolute, perfect, unconditional and indefeasible—just as good and valid, as *"it would have been had it been valid in the first place"*; and if this be true, we respectfully inquire, how can the acquisition of such a title be made the basis of an action for damages in acquiring such title? How can damages be predicated upon the acquisition of a title which in itself is absolutely perfect?

If the theory of the defendant in error, upon which this action is prosecuted, shall be upheld, the statute of limitation and the decisions of the courts in construing that statute must be abrogated and ignored. This Court will do indirectly that which is forbidden by the statute to be done directly. The title of the plaintiff in error will not be perfect, nor absolute, nor conclusive against the Government, but will be open to attack in all the years to come, on the grounds of the fraud of the patentee, and if the fraud be proved, damages recovered equal to the value of the land. The value of land and all other commodities is measured in money. If the value of the land measured in money under the name of damages can be taken from the patentee, after the statute of limitation has run, of what benefit to the patentee is this "benign" statute referred to in the case of United States vs. Winona R. R. Co., *supra?* This "benign" statute is a delusion and a snare. An action against a patentee for procuring a patent by misrepresentations and fraud may be maintained under the *alias* of an action for damages at any time within a century, and the equivalent of the land described in the

patent taken from him in money. In other words, the defendant in error contends by his complaint, that while you cannot take the land itself, you may take the equivalent of the land. Things that are equal to the same thing are equal to each other, and we think the position of the defendant in error is wholly untenable. It is an appeal to the courts to accomplish indirectly that which cannot be done directly. It has the appearance of subterfuge, a shift, a device, a trick, to reach an end regardless of the means, and we do not believe the United States or the courts will take such a position.

In the case of United States vs. California Land Co., 192 U. S. 355, upon the question of the *bona fides* of the United States in maintaining actions, the Court says:

> "It would be inconsistent with the good faith of the United States to attribute to it the intent *to keep a concealed weapon* in reserve in case its suit should fail."

And in this case we think it inconsistent with the good faith of the United States to permit the statute of limitation to run against a patent of its lands, the title to which has become absolute, conclusive and perfect by its own laches, then to attack the regularity of the issue of such patent on the ground of fraud under the mask of damages.

If this action had been commenced within six years after the issuance of patent, there is no doubt that the facts alleged would constitute a cause of action, for the title of the patentee would not have been perfect nor conclusive against the government, but

would be open to attack in an action to cancel the patent or an action for damages, at the election of the Government.

ELECTION OF REMEDIES.

Under this general head we will present the third fourth, fifth, sixth, seventh and ninth specifications of error. Does the record here show that defendant in error, prior to the commencement of this action, made an election of remedies by which it was bound and which would bar the maintenance of this action.

Briefly stated, this record shows that on the 10th day of April, 1911, defendant in error commenced its action to cancel the identical patent described in the complaint in the case at bar, involving the identical land, and upon the identical charges of fraud in procuring the patent (Trans., pp. 36–42). Issue was joined (Trans., pp. 43–52). A decree upon the merits of the issues joined was duly made and given on the 17th day of September, 1913, adjudging that this defendant in error take nothing by that suit and that it be dismissed (Trans., p. 53).

This record further shows that this plaintiff in error, the patentee named in said patent, and his wife, Grace Bistline, on the 4th day of November, 1910, conveyed eighty acres of the land described in said patent to Joseph H. Tolman, and on the 20th day of September, 1910, conveyed forty acres to Henry Caribo and Samuel Bloom, and on the 1st day of November, 1910, conveyed forty acres to Henry S. Woodland, the said conveyances covering all of the land described in said patent, which conveyances were duly executed for valuable considerations, and

the grantees therein named *immediately went into possession of their respective tracts* under such conveyances; and that said deeds on or about their respective dates were *each duly recorded in the office of the County Recorder of Bannock County, State of Idaho,* in accordance with the laws of said state (Trans., pp. 34, 35).

There can be no controversy about the general proposition that in case title to public lands has been divested through fraud, the Government may either bring suit to cancel the patent, or, *at its option,* maintain an action in damages to recover from the wrongdoer the value of the land, if the action chosen is brought within the proper time.

Vol. 1, Bigelow on Fraud, p. 63.
Vol. 2, Cooley on Torts (3 ed.), p. 165.
United States vs. Minor, 114 U. S. 223–239.
Southern Pac. Ry. Co. vs. United States, 200 U. S. 341.

"The doctrine of election means that where two inconsistent remedies are presented to the choice of a party, by a person who manifests a a clear intention that he should not enjoy both, he must accept the one and reject the other."

Peters vs. Bain, 133 U. S. 670.
In re Kenyon et al., 156 Fed. 863.
15 Cyc., pp. 257, 258, and cases cited.

"By a preponderance of authority, the mere commencement of any proceeding to enforce one remedial right, in a court having jurisdiction to entertain the same, is such a decisive act as constitutes a conclusive election, barring subse-

quent prosecution of inconsistent remedial rights."

15 Cyc., pp. 259, 260, and cases cited.
Klipstein vs. Grant, 141 Fed, Rep. 72.
Newell vs. Young, 109 Pac. 801.

"The *commencement* of the action and *not the result* of the action determines the election of remedies."

In re Garver, 68 N. E. Rep. 667.

"An election once made, with knowledge of the facts, between co-existing remedial rights which are inconsistent, is irrevocable and conclusive, irrespective of the intent, and it constitutes an absolute bar to any action, suit or proceeding based upon a remedial right inconsistent with that asserted by the election, or to the maintenance of a defense founded on such inconsistent right."

15 Cyc. 262, 263, and cases cited.
Wettenberger vs. Hall, 110 Pac. 911.
Smith vs. Gray, 100 Pac. 339.
Davis vs. Schmidt, 106 N. W. 119.
Wright vs. Dudgeon, 116 N. W. 598.
Ulrich vs. Bigger, 106 Pac. 1073.
Madison Stock Co. vs. Osler, 102 Pac. 325.
Penderson vs. Christopherson, 106 N. W. 958.
Kuhnes vs. Cahill, 104 N. W. 1025.
Bracton vs. Atl. Trust Co., 60 N. E. 772.

The Supreme Court of the United States in considering this question in the case of Robb vs. Vox, 155 U. S. 13, quotes with approval the rule adhered

to by the Michigan Supreme Court, and at page 40 of the opinion says:

> "A party may not take contradictory positions; and when he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge or *means of knowledge* of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again."

The quotation last above made is again quoted with approval in the case of Klipstein & Co. vs. Grant, 141 Fed. Rep., by the Circuit Court of Appeals for the Fifth Circuit.

It is also approved as the law in the case of Bacon & Co. vs. Moody, 117 Ga. 207, 43 S. E. 482.

See, also, Standard Varnish Co. vs. Haydock, 143 Fed. Rep. 318.
Stewart vs. Hayden, 169 U. S. 1.
Van Winkle vs. Croswell, 146 U. S. 42.

It was our contention at the trial, and we still insist, that an election of remedies made with knowledge of the facts, or *the means of knowledge of all the facts,* is binding upon the parties. The *means of knowledge* within the command of the party and by him ignored is as effectual in binding him to an election as if he had actual knowledge. We think constructive notice of the facts would be sufficient. Certainly common prudence would require any person contemplating an action when he was required to make an election to examine the public records

affecting the matters involved.

The defendant in error had full knowledge of all of the alleged fraud, as the allegations in the suit to cancel the patent are the same as in the case at bar. At the time it commenced the action to cancel said patent, it also had the means of knowledge of the conveyance of the lands described in the patent to divers persons by the patentee, for the reason that such deeds of conveyance were at that time of record in the office of the County Recorder of the county where the lands were situated. Not only that, but the purchasers of these lands, at the time said action to cancel said patent was commenced, were in actual possession of the lands purchased by them respectively (Trans., p. 34). It seems to us that an absolute duty rested on the defendant in error to ascertain from the records of the county if the lands described in the patent had been conveyed by the patentee, and to ascertain from a visit to the land if it was occupied or claimed by any other person. A failure to do this is inexcusable, and charges the defendant in error with the same knowledge which he might have had upon a most casual investigation or inquiry. The defendant in error ought not to be permitted to have advantage of its own laches, its own wrong; nor be heard to say that it had no knowledge of these conveyances when it commenced the action to cancel said patent, when said conveyances were of record in the public records of the county where the lands are situated, and the purchaser residing upon and in actual possession of said lands. In paragraph 7 of the complaint in the case at bar,

defendant in error alleges the facts of these conveyances (Trans., p. 10). It had the same *means of knowledge* of these facts on the 10th day of April, 1911, when it commenced the suit to cancel the patent, as it did on the 17th day of September, 1913, when it commenced the suit at bar, for these conveyances were all of record and had been of record since September and November, 1910. It seems to us that defendant in error ought to be bound by the *means of knowledge* at its command, in making its election of remedies.

Notwithstanding the fact that the evidence in support of this plea was entirely documentary and absolutely without conflict or contradiction, the Trial Court refused to pass upon the sufficiency of the evidence in support of the plea, as a matter of law, and refused to instruct the jury to find for the plaintiff in error upon said plea, and submitted the said plea to the jury (Trans., p. 54). These rulings of the Court we urge in specifications of error 3 and 4 to be error. If there was no issue of fact, and no conflict in the evidence, as to whether the plea was sufficient is purely a question of law, and it was prejudicial to the plaintiff in error to submit that question to the jury. The ordinary jury is wholly unprepared and unfitted to pass upon such a question.

Then the Court instructed the jury upon this question as set out in the fifth specification of error, and refused to give the jury the instructions upon this plea set out in the sixth specification of error. This brings us back to the question of law as to whether

or not the *means of knowledge* of all of the facts at the time of the election is sufficient to charge the party making such election, or, does it require actual knowledge? We believe that *means of knowledge* is sufficient. This position is clearly supported by the authorities cited. Were this not the correct rule, persons having dual remedies would purposely abstain from making ordinary investigation and inquiry as to certain facts bearing upon his case, so that if he was defeated *in his first action,* he might be excused from his election and thereby gain the opportunity to have another trial of his case upon the same facts. The Trial Court by the giving and refusing of said instructions held as a matter of law that actual knowledge of all the facts was indispensable, and that even though the *means of knowledge* was at the command of the person making the election, unless he availed himself of such *means of knowledge* and acquired actual knowledge, the plea could not obtain.

The seventh and ninth specifications of error raise the questions that the verdict is not supported by the evidence and the judgment should have been for the plaintiff in error, for the reasons heretofore stated, that the evidence was entirely documentary and without conflict, and showed conclusively that the defendant in error had the knowledge or the means of knowledge of all of the facts bearing upon the controversy at the time when it commenced its suit in equity to cancel the patent in question, and having such knowledge and means of knowledge of all the facts, by commencing such suit in equity to cancel said patent, it made an election of remedies

by which it became bound, which is a bar to the maintenance of this action to recover damages based upon the same state of facts.

RES ADJUDICATA.

It will be observed from reading the answer as amended to the complaint herein that there is not only an *election of remedies* pleaded as a bar to this action, but it is also pleaded that the judgment entered on the 17th day of September, 1913, dismissing the suit in equity to cancel the patent heretofore mentioned, is a complete adjudication on the merits of the controversy and *res adjudicata* as to the matters involved in this action.

The record of the suit in equity including said judgment was received in evidence for this purpose (Trans., pp. 36–53).

The Trial Court held as a matter of law that the proof and evidence aforesaid was not sufficient to support the plea and dismissed the same, to which ruling the plaintiff excepted (Trans., pp. 54, 55).

This ruling is assigned as error and presented by specifications of error 8 and 9.

There is a well-defined distinction between the two special defenses submitted. An election of remedies exists only where there are two inconsistent remedies available to a party, one of which is chosen. Any distinct act consitutes an election. It is not necessary in order to constitute an election that a final judgment or any judgment shall be entered so as to bar another action. It is the election that constitutes the bar.

On the other hand, in order that the plea of *res*

adjudicata may be available as a defense, it is necessary that a final judgment upon the merits of the controversy shall have been entered so as to bar a second action. So far as the defense is concerned, there may have been only one remedy in the first instance, and yet if such remedy was pursued to a final judgment upon the merits, a determination of the action upon the merits would be a bar to any subsequent action based upon the same facts.

Coming now to the evidence in the case at bar, the record here shows by a comparison of the said bill in equity to cancel said patent (Trans., pp. 36–42) with the complaint in this action (Trans., pp. 5–12) that the material facts alleged as a cause of action are identical; that the patent involved is the same; that the lands are the same; that the parties are the same; that the acts of fraud charged are the same; and the only difference is the prayer for relief—one demands cancellation, the other damages.

Upon said bill in equity to cancel said patent, issue was joined and before the commencement of this action, to wit, on the 17th day of September, 1913, a decree in equity was duly made and given adjudging that the complainant in said bill take nothing thereby and that said bill be dismissed. There are no reservations, conditions or limitations whatever in the decree or in the record. The decree recites that said "cause came regularly on for trial," and so far as the record shows the trial may have been upon evidence submitted which was found to be insufficient or unworthy (Trans., p. 53).

We respectfully submit that all presumptions of

the law are in favor of this judgment. It certainly ought to be given full faith and credit for what it appears to be upon its face, and to the facts therein contained. It says in terms that the cause came regularly on for trial, and it is adjudged that complainant take nothing by the bill and that the same be dismissed. How could a judgment of dismissal be more perfect? What could be added to make it more effective?

We especially call attention to the fact that this record in the equity suit was all of the evidence upon the plea of *res adjudicata*. The record was not assailed in any particular. The judgment was not attacked in any manner. There was no explanation or extenuation offered or claimed. The record in the equity suit stands as the only evidence unexplained and unimpeached. It is for the Court to say what effect will be given to it as it appears in this record.

There can be no doubt upon the general proposition of law that the dismissal of a suit by the plaintiff, when such dismissal is upon the merits of the controversy, is as conclusive upon the rights of the parties as any other judgment that might have been rendered in the case.

Durant vs. Essex Co., 7 Wall. (U. S.) 107.
Parish vs. Ferris, 2 Black. (U. S.) 606.
Lyon vs. Perin, 125 U. S. 698.

But let us examine the authorities bearing more directly upon the decree relied on in the case at bar. In the case of Baker vs. Cummins, 181 U. S. 117, the syllabus states the rule as follows:

"A general dismissal on the merits of a bill in equity, not made conditionally, or without prejudice, or with any saving of the rights of the action, will constitute a bar to the use of the cause of action there involved as a setoff in a subsequent action at law between the same parties."

Lyon vs. Perin, 125 U. S. 698.
Waldron vs. Bodley, 14 Pet. (U. S.) 156–161.
Durant vs. Essex Co., 7 Wall. (U. S.) 107.

Quoting from the third syllabus in the case of Lyon vs. Perin, 125 U. S. 698, the rule is stated as follows:

"Where words of qualification such as 'without prejudice' or other terms indicating a right or privilege to take further legal proceedings on the subject do not accompany the decree, *it is presumed to be rendered on the merits.*"

In the case of Hubbell vs. United States, 171 U. S. 203, the Court states the proposition that a suit cannot be brought upon a certain state of facts, and, after the dismissal of the action, another suit brought against the same party upon the same state of facts and recover upon a different theory. The judgment is an estoppel, in favor of the successful party in any subsequent action on the same state of facts.

This general proposition is supported by many authorities:

Bradley vs. Eagle Mfg. Co., 57 Fed. 989.
Cromwell vs. County of Sac, 94 U. S. 351.
Campbell vs. Rankin, 99 U. S. 261–263.
Block vs. Commissioners, 99 U. S. 686–693.

Wilson vs. Dean, 121 U. S. 525–532.

Bissell vs. Spring Valley Tp., 124 U. S. 225–231.

Nesbitt vs. Independent District, 144 U. S. 610–618.

R. R. Co. vs. Alsbrook, 146 U. S. 279–302.

McComb vs. Frink, 149 U. S. 629.

Werlein vs. New Orleans, 177 U. S. 390.

U. S. vs. California Land Co., 192.

"A judgment between the same parties in which a claim of plaintiff is decided, or was properly involved and might have been there presented and determined, is a bar to another action for the same cause. The neglect of the plaintiff to avail himself of it furnishes no reason for another litigation."

Stockton vs. Ford, 59 U. S. 419.

"When a second suit is upon the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the first."

Dowell vs. Applegate, 152 U. S. 327.

Cromwell vs. County of Sac, 94 U. S. 531.

Nesbitt vs. Independent District, 144 U. S. 610.

Stockton vs. Ford, 59 U. S. 418.

In Davis vs. Brown, 94 U. S. 428, Mr. Justice Field, in support of a prior judgment, said:

"The judgment is not only conclusive as to what was actually determined, respecting such

demand, but as to every matter which might have been brought forward and determined respecting it."

In New Orleans vs. Citizens' Bank, 167 U. S., at page 396, Mr. Justice White, speaker for the court, said:

"The estoppel resulting from the thing adjudged does not depend upon whether it is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies."

So. Pac. R. R. Co. vs. U. S., 168 U. S. 1.
U. S. vs. California and Oregon Land Co., 192 U. S. 355.

"A cause of action is said to be the same as that of a former suit where the same evidence will support both actions; and a judgment in such former action will be a bar if the evidence necessary to sustain a judgment for the plaintiff in the second would have authorized a judgment for plaintiff in the former one."

Taylor vs. Castle, 42 Cal. 367, 368.
Gayer vs. Parker, 24 Neb. 643.

In conclusion, we call attention to the fact that after the defendant in error had submitted evidence and rested, the plaintiff in error offered the evidence hereinbefore mentioned in support of his pleas in bar

and offered no further evidence, but relied upon said special pleas (Trans., p. 54).

We believe the plaintiff in error was fully justified in such a course. We confidently expected the Trial Court to sustain said pleas, and felt that there was no occasion to gather a number of witnesses to submit testimony upon the general issue of fraud. When this case was tried on the 16th day of March, 1914, more than eight (8) years had elapsed since the issue of patent. Time had naturally rendered the collection of witnesses and the gathering of testimony difficult. Why should the plaintiff in error go to all this trouble, when he felt confident that, as a matter of law, no cause of action was stated against him and that his special pleas in bar were conclusive of the matters involved. He did rely upon the law of the case and failed to offer proof. He would have offered proof had not he felt confident of his position in the matters of law.

For these reasons, and for the reason that the questions presented are of great importance to the general public in public land matters, we earnestly urge the matters here presented, still confident that the plaintiff in error is entitled to the protection of the law, which he has invoked, and that the Trial Court committed the errors herein specified.

TERRELL & TERRELL,
Attorneys for Plaintiff in Error.
Residence, Pocatello, Idaho.